*Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431 (2001). *Missouri Republican Party v. Lamb*, 227 F.3d 1070 (8th Cir. 2000), cert. granted and opinion vacated sub nom. *Nixon v. Missouri Republican Party*, 533 U.S. 945 (2001) (mem.); on remand, *Nixon v. Missouri Republican Party*, 270 F.3d 567 (8th Cir. 2001).

Here, the Eighth Circuit cites *Buckley* merely for its broad statements about the value of political speech. *See Republican Party of Minnesota v. White*, 416 F.3d at 748. It addresses *Shrink Missouri Government* and this Court's most recent precedent, *McConnell v. FEC*, 540 U.S. 93 (2003), only in a footnote answering an argument made by the dissent. 416 F.3d at 756 n. 8.

The superficiality of the Eighth Circuit's analysis is evident in that footnote. The majority holds (*id.* at 749) that Minnesota's solicitation clause is subject to full "strict scrutiny" – the sort that in the Eighth Circuit's application proves to be not just "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 202 (1995). The Eighth Circuit majority expressly recognizes that in *McConnell*, *Shrink Missouri Government*, and *Buckley*, this "Court applied a 'less rigorous [than strict scrutiny] standard of review.'" 416 F.3d at 756 n. 8, quoting *McConnell*, 540 U.S. at 137. The majority feels no compulsion to defend its choice because "the dissent acknowledges that strict scrutiny applies." 416 F.3d at 756 n. 8. But as the Eighth Circuit admits, in *Buckley* and its progeny this Court did not blaze the "strict scrutiny" trail that the Eighth Circuit now follows.

The interests that Minnesota, Missouri, and other states are attempting to address through restrictions on the solicitation of contributions by judges and candidates for judgeships should be subject to the "less rigorous standard" of *Buckley* and its progeny. Those interests are in no respect less compelling than

the ones at issue in the contribution limits cases. Indeed, they may be greater, for an independent judiciary is the last check on the corruption that campaign contribution regulations are intended to attack. The inconsistency between the Eighth Circuit's treatment of the states' interests in protecting against the appearance and reality of judicial partiality and this Court's treatment of the states' interests in protecting against the appearance and reality of legislative and executive corruption merits review by this Court.

4. Missouri has concluded that it simply cannot afford, as a state, to have the public lose the perception that judges are above partisanship. Under the campaign contributions cases, that conclusion merits more deference than the Eighth Circuit was willing to give. And such deference is even more important where we are dealing with the kind of sovereignty choice at issue in *Gregory v. Ashcroft*.

Failure to give Missouri that kind of deference will have a significant adverse impact despite the State's famous choice to move away from elections as the exclusive method of judicial selection. As noted above, Justice O'Connor noted that movement in *White*, suggesting a line between "contested popular elections" on the one hand, and "an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan" on the other. *White v. Minnesota*, 536 U.S. at 792 (O'Connor, J. concurring). But nothing in the Eighth Circuit's analysis suggests that it will reach a different result when it crosses that line and considers Missouri's "combined appointment and retention election system."

To the contrary, the Eighth Circuit's rationale leads implicitly but inexorably to the conclusion that once any state exercises its sovereignty to allow judicial elections, the State is compelled to treat those elections precisely as it treats elections

for executive and legislative branch positions. The Eighth Circuit concludes, in essence, that an election is an election, and that we should expect and must allow judicial candidates and their partisan supporters to speak and act just as candidates for the legislature. In effect, the choice left to the states by the Eighth Circuit significantly limits their ability to choose a judicial selection system with a different tone and feel. The Eighth Circuit would bar states from giving the public a say in judicial selection and retention without opening the campaign door completely. In other words, under the Eighth Circuit's rationale states are left with an "all or nothing" choice.

The Missouri Plan that Justice O'Connor correctly distinguished from open election systems is neither all nor nothing. Judges selected under that Plan need not stand for election at the time of appointment, but must stand for retention elections. Even retention elections can become heated. *See, e.g.*, Robert S. Thompson, "Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986," 61 SO. CAL. L. REV., 2007 (1988); B. Michael Dann & Randall M. Hansen, "Judicial Retention Elections," 34 LOYOLA L.A. L. REV., 1429 (2001). And a heated election, even in a nonpartisan race, can quickly become – covertly or overtly – a vehicle for partisan warfare.

Missouri has recently experienced such an event. In 2004, there was a movement in opposition to the retention of Missouri Supreme Court Judge Richard Teitelman, who had been appointed by Governor Bob Holden, a Democrat. Though the effort was not overtly partisan, a prominent Republican legislative leader with a reputation for partisan advocacy was its most prominent leader.[4]

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[4]*See* "Campaign against state judge foreshadows legislative effort," Southeast Missourian, Nov. 17, 2004, viewed Dec. 30, 2005, at

To prevent its nonpartisan judicial appointment and retention system from becoming as partisan a battleground as "contested popular elections" may become,[5] Missouri needs the additional protection provided by restrictions on the movement of campaign money directly into judges' hands. Missouri's canon largely parallels Minnesota's. *See* Mo. Sup. Ct. Rule 2.03, Canon 5(B)(2). That canon may be more important in the

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http://www.semissourian.com/story.html$rec=150430; "Important Letter From Rep. Rod Jetton," viewed Dec. 30, 2005, at http://www.boonecountyrepublicans.com/jetton.htm.

[5] We do not suggest that partisan battles are common in judicial elections in Missouri, nor that such elections are decided on the basis of partisan affiliation, as some claim. *E.g.*, The Federalist Society Judicial Appointments White Paper Task Force, "The Case for Judicial Appointments" (2003), viewed Dec. 9, 2005, at http://www.fed-soc.org/Publications/White%20Papers/judicialappointments.htm. Partisan positioning in judicial races in Missouri is rare, as is evidence of party-line judicial selections. In fact, a comparison of results in contested 2004 elections for circuit judges in nonmetropolitan circuits with results in the hotly contested gubernatorial race that same year, using data available on the Missouri Secretary of State's website at http://www.sos.mo.gov/enrweb/, show dramatic differences between the totals for judicial candidates and gubernatorial candidates from the same party. For example, in the 25th Judicial Circuit, the Democratic candidate for circuit judge ran 17 percentage points ahead of the Democratic gubernatorial candidate in Phelps County, 12 points in Maries County, 10 points in Pulaski County, and 7 points in Texas County. By contrast, in the 26th Circuit, the Republican candidate for circuit judge ran 11 points ahead of the gubernatorial candidate in Laclede County, but behind the gubernatorial candidate in Camden County. Those differences belie the conclusion that "voters in partisan elections have no choice but to rely on party cues, thus linking selection to national or local partisan issues rather than qualifications or job performance." Judicial Selection White Paper, *supra*. Such claims ring particularly hollow in Missouri's least populous counties. *See* n. 3, *supra*.

judicial elections in counties that have not yet joined the Missouri Plan. But if this Court denies the petition, that canon will undoubtedly draw a challenge even as it applies to retention elections.

Missouri's choice to retain some element of popular voice in the judicial selection and retention process through that plan will then be subject to the Eighth Circuit's rule. Under that rule, Missouri may be unable to fully exercise its sovereign power to craft a judiciary in a model that makes sense to those closest to the people. Such an infringement on the sovereignty of Missouri and the six other Eighth Circuit states – and its potential application to the remaining 43, including dozens that have adopted the Missouri Plan – merits the attention of this Court.

## CONCLUSION

For the reasons stated above, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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No. 05-566

IN THE

# Supreme Court of the United States

MARTHA HOLTON DIMICK, CHAIRPERSON, MINNESOTA BOARD ON JUDICIAL STANDARDS, *ET AL.*,
*Petitioners*,

v.

REPUBLICAN PARTY OF MINNESOTA, *ET AL.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION

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IN THE

# Supreme Court of the United States

No. 05-566

MARTHA HOLTON DIMICK, CHAIRPERSON,
MINNESOTA BOARD ON JUDICIAL STANDARDS, *ET AL.*,
*Petitioners*,

v.

REPUBLICAN PARTY OF MINNESOTA, *ET AL.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION

## INTEREST OF THE *AMICUS CURIAE* [1]

With more than 400,000 members, the American Bar Association is the nation's leading representative of the legal profession.[2] Members of the ABA come from all 50 states, the

[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have filed letters consenting to the filing of this brief with the Clerk of this Court.

[2] Neither this brief nor the decision to file this brief should be interpreted to reflect the views of any judicial member of the ABA. No mem-

District of Columbia, and the United States' territories. Its members include attorneys in private practice, government service, corporate law departments, and public interest organizations, as well as law professors, legislators, law students, and non-lawyer associates in related fields.

The ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law in a democratic society. Its mission is to serve the public and the profession by promoting justice, professional excellence and respect for the law. Stated goals of the ABA include "preserv[ing] the independence of the legal profession and the judiciary as fundamental to a free society." ABA POLICY AND PROCEDURES HANDBOOK 2005-2006 (Goal XI).

The ABA is currently evaluating its judicial canons. On December 14, 2005, the ABA Commission to Evaluate the Model Code of Judicial Conduct released a final, complete draft of its proposed new canons and rules, including those addressing political activity. *See* ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, *Final Draft Report*, http://www.abanet.org/judicialethics/finaldraftreport.html. The chair of the ABA Commission, inviting public comment to the draft, noted that "[t]he code must provide the guidance judges need, while also assuring a regulatory structure that reinforces the rectitude we expect from our judiciary." News Release, ABA, *ABA Releases Complete Final Draft of Revisions to Model Code of Judicial Conduct* (Dec. 21, 2005).

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ber of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division prior to filing.

The most substantial revisions to the Model Code involve Canon 5's provisions governing political activity of judges and judicial candidates. The ABA strives to ensure that the judiciary's integrity, independence, and impartiality are not undermined by inappropriate political activity. Particularly now, when the ABA's House of Delegates will consider the Commission's proposed, revised canons, this case interests the Association.

## SUMMARY OF THE ARGUMENT

This Court should review the Eighth Circuit's *en banc* decision for two reasons:

*First*, the impact of *White* is uncertain. Judicial elections and the state codes modeled on the ABA canons will be in limbo without guidance from this Court. Issues concerning fundraising and political activities in judicial campaigns are likely to recur unless the Court intervenes.

*Second*, the proper scope of campaign regulations affecting judicial candidates and judges is important to the ABA and the public. The ABA's Model Code must both advance the goals of judicial independence, integrity, and impartiality and comport with this Court's guidance.

## ARGUMENT

### I. The Petition Raises Issues Of Nationwide Import.

Every state, and the federal judiciary, has adopted some set of judicial canons predicated on the ABA's model. *See generally* L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 7 (1992); M. Peter Moser, *The 1990 ABA Code of Judicial Conduct: A Model for the Future*, 4 GEO. J. LEGAL ETHICS 731, 731 n.3 (1991). Moreover, the preferred merit selection method for choosing judges notwithstanding, the ABA committee drafting the Model Code has for some time been "aware that the public election method was deeply

rooted in many jurisdictions and unlikely to change significantly in the near future." MILORD, *supra*, at 46. Accordingly, the ABA must confront the dual reality that (1) judicial-ethics codes modeled on ABA standards are in force everywhere there are judges in this country, and (2) many of those judges will be chosen in elections, where they must campaign for office.

In the face of *Republican Party of Minn. v. White*, 536 U.S. 765 (2002), no state that follows the ABA model can be sure how to conduct an election, and no judicial candidate can know the boundaries of permissible campaign behavior. This Court's guidance is critical for the proper operation of judicial elections.

### A. The Eighth Circuit's Ruling Calls into Question Portions of the Judicial Canons of 31 States Across the Nation.

The ABA's Canons of Judicial Ethics (1924), Code of Judicial Conduct (1972), and Model Code of Judicial Conduct (1990) serve as the basis for the states' and federal judiciary's codification of "basic standards which should govern the conduct of all judges." ABA MODEL CODE OF JUD. CONDUCT (1990) (Preamble). Since the ABA began its work on the creation of standards for ethical conduct of judges in 1922, every state in the union, along with the federal judiciary, has adopted some iteration (albeit with a variety of modifications) of the ABA's judicial ethics guidelines. *See generally* MILORD, *supra*, at 7; Moser, *supra*, at 731 n.3.

Specific to this case, 29 states have crafted a ban on judicial candidates' personal solicitation of campaign contributions like that reflected in Minnesota's Canon 5B(2).[3]

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[3] *See* ALASKA C[illegible]T RULES, CODE OF JUD. CONDUCT, Canon 5C(3) (West 2006); 17A ARIZ. REV. STAT. ANN., S. CT. R. 81, CODE OF JUD. CONDUCT, Canon 5B(3) (West 2005); ARK. CODE ANN., CODE OF JUD. CONDUCT, Canon 5C(2) (Lexis Nexis 2005); COLO. CT. RULES ANN., Ch.